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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Supreme Court, U.S.
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IRVING GILBERT, et al., and LILLIAN ROBERTS,
as Commissioner of Labor of the State of New York,

Appellants,

– against –

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX TO JURISDICTIONAL STATEMENTS

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 902, 943, 953 — August Term, 1984

(Argued: March 11, 1985 Decided: June 17, 1985)

Docket Nos. 84-7824, 84-7908, 84-7914

IRVING GILBERT, IRENE PRINCE, DAVID J. FRANK, HERBERT P. KAPLAN, BERNARD H. LARGMAN, DOROTHY MIHALKER, DORA NICOLINI, HERBERT PEPPEL, BERTHA RICHIE, DAVID SCHOENECK, RAQUEL R. SILENSKY, MARIE SILVESTRI, BRENDA TILLMAN HUMPHREYS, B. GAITHER SHAW, JR., NORMAN J. WILLIAMS, ROBERT E. AHRENS, BENJAMIN F. BLYE, JR., DAVID H. BRUNT, JACK R. CARPENTER, KENNETH E. ECKARD, RONALD F. GAUTHIER, LOUIS GORELICK, JEREMY HARRIS, RONALD H. HICKS, ROBERT D. HUDDLESTON, THOMAS R. JEROME, GASTON D. LOPEZ, DOROTHY NOVAK, ANTHONY J. PETRONIS, BERNARD PORVIN, CHARLES A. POWERS, SAUL ROTH, JAMES A. SBARBORO, JOHN SELLS, JAMES M. STUTTS, and GORDON L. VAN DUSEN,

Plaintiffs-Appellants,

LILLIAN ROBERTS, as Commissioner of Labor of the State of New York,

Plaintiff-Intervenor-Appellant,

—v—

BURLINGTON INDUSTRIES, INC.,

Defendant-Appellee.

Before:

TIMBERS, CARDAMONE and PIERCE,
Circuit Judges.

Appeal by 36 plaintiffs, former employees of appellee Burlington Industries, and an appeal by the New York State Commissioner of Labor, as intervenor, both from a judgment entered in the United States District Court for the Southern District of New York (Brieant, J.) on October 30, 1984. The judgment dismissed plaintiffs' state law claims for severance pay benefits on the grounds that they were preempted by ERISA and dismissed the intervenor's complaint for the same reason.

Affirmed.

VICTOR RABINOWITZ, New York, New York (Emily Bass, Terry Gross, Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., New York, New York, of Counsel), *for Plaintiffs-Appellants.*

JANE LAUER BARKER, Deputy Bureau Chief, New York, New York (Robert Abrams, Attorney General of the State of New York, Robert Hermann, Solicitor General, O. Peter Sherwood, Deputy Solicitor General, Carlin Meyer, Assistant Attorney General in Charge of Labor Bureau, New York, New York, of Counsel), *for Plaintiff-Intervenor-Appellant.*

DANIEL RIESEL, New York, New York (Lawrence R. Sandak, Sive, Paget & Riesel, P.C., New York, New York, of Counsel), *for Defendant-Appellee.*

Lacy H. Thornburg, North Carolina Attorney General, Tiare B. Smiley, Assistant Attorney General, Department of Justice, Raleigh, North Carolina, John C. Brooks, North Carolina Commissioner of Labor, Thomas A. Harris, Director, Wage and Hour Division, North Carolina Department of Labor, Raleigh, North Carolina, *filed a Brief for Amici Curiae for the States of Alaska, Connecticut, Hawaii, Illinois, Maryland, Montana, North Carolina, Oklahoma, Vermont, Wisconsin, and the District of Columbia.*

CARDAMONE, *Circuit Judge*:

We review on this appeal an employer's severance pay policy to decide whether it is an ERISA plan that preempts a state from ordering an employer to pay benefits to departing employees. By the terms of the employer's manual, eligibility to receive severance pay was limited to those employees "involuntarily terminated" from the company, *i.e.*, separated from the employer's payroll and not later reemployed by the company. Eligibility for benefits thus was to be determined by the discontinuity of an employee's employment—its severance—and not by the duration of unemployment, however fleeting that might be. Here, there was a purchase of one of the company's operating divisions as a going concern; plaintiffs are employees of that division. For plaintiffs this was not a temporary leave-taking, but a permanent parting-of-the-ways with their former employer. For the reasons discussed below, we hold that the employer's severance pay plan is an employee benefit plan under ERISA and that the state is preempted from granting benefits to plaintiffs. Plaintiffs

must seek relief from what they consider to be an arbitrary denial of their severance benefits under federal, not state, law.

I

Facts and Proceedings Below

Plaintiffs, 36 former employees of Burlington Industries, a textile manufacturer, have brought suit against Burlington claiming that severance pay is owed them upon termination of their employment. In their complaint plaintiffs assert eleven claims, seven seek relief under state law and four under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (ERISA or Act). The state law claims include causes of action under New York Labor Law § 198-c, North Carolina General Statutes § 95-25, and common law theories of fraud, unjust enrichment, promissory estoppel, quantum meruit, and breach of contract. Prior to the commencement of this action, a number of the present plaintiffs filed claims with the New York State Department of Labor and obtained an order from the Commissioner of Labor that directed Burlington to pay them severance benefits. When Burlington appealed this ruling to the State Industrial Board of Appeals and sought a stay of the Commissioner's order, plaintiffs commenced the instant federal action in which the State Commissioner was later granted leave to intervene as a party plaintiff.

This appeal is from a judgment, entered in the United States District Court for the Southern District of New York (Brieant, J.) on October 30, 1984, which dismissed plaintiffs' state law claims on the grounds of preemption, dismissed the complaint made by the New York

State Commissioner of Labor as intervenor for the same reason, and enjoined the Commissioner from enforcing compliance orders she had issued against Burlington. Plaintiffs' four claims that seek relief under ERISA were not dismissed.

Although plaintiffs worked in 16 different states, they all reported to Burlington's merchandising headquarters in New York. In 1982 Burlington sold its operation as a going concern to Kayser-Roth. The employees continued to do the same work as they had before the sale. In order to ensure that its employees would accept employment with Kayser-Roth, Burlington agreed not to retain employees Kayser-Roth wished to hire, and also agreed not to rehire them for at least six months after the sale. Plaintiffs contend that they were employed by Kayser-Roth at a lower rate of compensation, while Burlington argues that the benefit package paid its former employees was comparable to their previous earnings.

Burlington's severance pay policy was contained in a manual that was not distributed to employees. The policy reads, in relevant part:

I. Company Policy

A. General—The Company makes payroll severance payments and vacation severance payments to eligible salaried employees who are terminated from the Company.

B. Payments—Payroll severance payments are based upon tables contained in this policy. Vacation severance payments are based upon a person's length of continuous service with the Company less vacation taken or adjusted as defined by this policy.

II. Application of Policy

A. Payroll Severance—All regular full-time salaried employees who meet eligibility requirements are paid payroll severance based upon continuous service as shown in Exhibit A or Exhibit B.

1. Eligibility—Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are *involuntarily terminated from the Company.* Eligibility requirements are:

a. Job Elimination—This category consists of terminations due to circumstances such as elimination or modification of operations or other *job elimination* due to bona fide organizational changes (emphasis added).

. . .

A summary description of the severance policy was contained in an employee handbook, which read:

> The Company provides severance pay to full time employees who *involuntarily leave the company.* Pay ranges from two weeks to 12 months, based on the employee's age and length of continuous service with the company. Fraud or other behavior deemed to be willful could disqualify an employee from receiving severance benefits (emphasis added).

The granting or denial of severance pay was automatic upon termination. Plaintiffs allege that Burlington never sought to comply with ERISA respecting its severance pay policy. That is, they claim that: it never published or filed an annual report, a financial statement, a plan description or a statement of plan modifications; it did not designate a fiduciary for the plan or inform employees of their rights under ERISA and the plan; there was no

established claims procedure; and, apart from the company's "open door" grievance policy, there was no established appeals procedure. The first time Burlington filed the required annual ERISA disclosure report regarding severance pay was after plaintiffs filed claims with the New York State Department of Labor.

Shortly before the sale to Kayser-Roth, Burlington's employees were informed that they were deemed ineligible for severance benefits, whether or not they accepted a position with Kayser-Roth. Although plaintiffs were never unemployed, as they immediately accepted positions with Kayser-Roth, they claimed they were entitled to severance pay under the plain language of the company's policy. When Burlington refused to make severance payments, ten of the present plaintiffs asserted before the State Department of Labor that they were entitled to severance pay, and the Commissioner issued orders under the New York Labor Law requiring Burlington to pay such benefits. Burlington petitioned the State Industrial Board of Appeals to review the Commissioner's decision. Before scheduled hearings could be held, plaintiffs commenced the instant action in the district court asserting claims under state law, and alternatively, under ERISA. The Commissioner intervened demanding that Burlington pay severance benefits in accordance with § 198-c of the New York Labor Law, which makes it a misdemeanor not to pay wages or wage supplements due employees. N.Y. Lab. Law § 198-c (McKinney Supp. 1984-1985).

In its well-considered opinion, the district court held that Burlington's severance pay policy was an ERISA plan, under either 29 U.S.C. § 1002(1)(A) or § 1002(1)(B). It found that an ERISA plan did not need to have assets separate from the general assets of the employer,

that a severance pay plan did not need to be established as a Taft-Hartley trust under § 1002(1)(B) and that, in any event, severance pay was the same as unemployment benefits and a severance policy was consequently a "welfare plan" under § 1002(1)(A). The district court found as a matter of law that severance pay constitutes an unemployment benefit because it requires an "instantaneous unemployment between engagements." The factual issue of whether longer unemployment was a prerequisite under the terms of Burlington's policy was not decided. The district court further held that ERISA preempted the state law causes of action. It therefore permanently enjoined the proceedings before the State Industrial Board and enforcement of its Orders to Comply with the Commissioner's decision pursuant to § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). Judge Brieant denied the Commissioner's application to stay the federal action and, on his own motion, certified his decision on preemption for immediate review by this Court pursuant to Fed. R. Civ. P. 54(b). Plaintiffs and the State of New York were joined on the appeal by ten states and the District of Columbia that filed briefs as amici curiae.

This appeal presents three principal questions: first, whether the district court was correct in holding that an unfunded severance pay policy is an ERISA plan under either § 1002(1)(A) or § 1002(1)(B); second, if Burlington's severance policy is an ERISA plan, whether the plaintiffs' state law claims and § 198-c (insofar as it applies to severance plans) are preempted; finally, whether Burlington should be estopped from raising a defense of preemption because it allegedly never sought to comply with ERISA's protective reporting and disclosure requirements.

II

Does An Unfunded Severance Pay Policy Constitute A Welfare Benefit Plan Within The Meaning of ERISA?

The first issue is whether Burlington's severance pay policy constitutes an employee welfare benefit plan under § 3 of ERISA. 29 U.S.C. § 1002(1). Amici and appellants argue that a promise or agreement to pay severance benefits, without more, does not constitute a welfare benefit plan within the meaning of ERISA. If the severance pay plan is not one governed by ERISA then, of course, the common law and statutory claims are not preempted. Section 3(1) of ERISA defines an "employee welfare benefit plan" or "welfare plan" to include:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title [§ 302(c) of the Labor-Management Relations Act] (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1). Section 1002(1)(A) enumerates a number of benefits, including unemployment benefits, but

severance benefits is not included among them. Section 1002(1)(B) includes within the definition of a welfare plan "any benefit" described in 29 U.S.C. § 186(c), but § 186(c) refers only to *pooled* severance benefits.

Although severance pay is often a reward for past service, it also serves the same purpose as unemployment benefits. When ties that bind an employee to his or her company are severed by the employer, unemployment for the employee—whether fleeting or permanent—is an inexorable consequence. Thus, in our view severance pay is an unemployment benefit and an unfunded severance pay policy constitutes an "employee welfare benefit plan" under § 1002(1)(A). *See Jung* v. *FMC Corp.*, 755 F.2d 708, 710 n.2 (9th Cir. 1985); *Petrella* v. *NL Industries*, 529 F. Supp. 1357, 1361 (D.N.J. 1982). *See also Sly* v. *P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983).

We also conclude that an unfunded severance pay policy is an "employee welfare benefit plan" under § 1002(1)(B). *See, e.g., Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985); *Dhayer* v. *Weirton Steel Division of National Steel Corp.*, 571 F. Supp. 316, 329-330 (N.D. W. Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2387 (1984); *Pinto* v. *Zenith Radio Corp.*, 480 F. Supp. 361, 363 (N.D. Ill. 1979), *aff'd mem.*, 618 F.2d 110 (7th Cir. 1980). *Donnelly* v. *Aetna Life Insurance Co.*, 465 F. Supp. 696, 698 (E.D. Pa. 1979).

We base our view on the reasonableness of a regulation that construes § 1002(1)(B) to include severance pay. The United States Department of Labor regulation interpreting § 1002(1)(B) does not limit its definition of a plan to a severance pay policy that is pooled or funded by a trust fund. *See* 29 C.F.R. § 2510.3-1(a)(3) (1984);

Blau v. *Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1985). The regulation includes unfunded severance pay benefits as within the definition of a "welfare plan," and reads:

> Moreover, only paragraph (6) describes benefits not described in section 3(1)(A) [29 U.S.C. § 1002(1)(A)] of the Act. The benefits described in section 302(c)(6) of the LMRA [29 U.S.C. § 186(c)(6)] but not in section 3(1)(A) of the Act are "*** holiday, severance or similar benefits". *Thus, the effect of section 3(1)(B) of the Act is to include within the definition of "welfare plan" those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized).*

29 C.F.R. § 2510.3-1(a)(3) (1984) (emphasis added).

Amici correctly note that the regulation bases its conclusion on paragraph (6) of § 186(c), 29 U.S.C. § 186(c)(6), which allows payments by an employer to a "trust fund" established for the purpose of "*pooled* vacation, holiday, severance or similar benefits." *Id.* (emphasis added). From this they argue that the regulation is inconsistent with that language. They urge that as severance benefits were not enumerated in subparagraph (A) of § 1002(1), but were incorporated only in subparagraph (B), then unless severance payments are made out of a *fund* described in § 186(c), a severance pay policy is not an ERISA plan.

We recognize the well-established rule that "[a]lthough an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear

meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979) (citation omitted). In plaintiffs' view none of the decisional law that finds unfunded severance pay practices to be plans—when those courts summarily accept jurisdiction under ERISA for such claims—has adequately analyzed either the legislative history or the full language of the LMRA provisions relating to trusts. We find that a review of the legislative history supports the reasonableness of the Department of Labor's construction of § 1002(1)(B).

The Report of the Senate Committee on Labor and Public Welfare indicates that subsection (B) had its genesis in "[a]n amendment offered by Senator Javits extending coverage of the fiduciary and disclosure amendments to the [Welfare and Pension Plans Disclosure Act] to all benefit arrangements *described in or permitted by*" § 186. S. Rep. No. 127, 93rd Cong., 2d Sess. 3 (1973), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4851 (emphasis added). Burlington argues that "described in or permitted by" indicates an intent to include plans funded other than through a Taft-Hartley trust, since such plans would not be "permitted by" but would be "described in" § 186. Use of the phrase "described in"—the only phrase ultimately chosen by Congress to use in the Act—arguably expresses a purpose to encompass all *types* of benefits that are enumerated in § 186(c), even those benefits not permitted under the section because they are not funded through a trust. In consequence, we conclude that the U.S. Department of Labor's interpretation that an unfunded severance pay policy is an "employee welfare benefit plan" under § 1002(1)(B) is a reasonable construction of the statute and entitled to judicial deference.

Amici and plaintiffs assert that Burlington's unfunded severance pay policy is, instead of an ERISA plan, merely a "payroll practice" under Department of Labor regulations. They argue that severance pay is included under a regulation that lists payments of compensation out of an employer's general assets during periods of absence due to sickness, vacation, holiday, and other reasons. *See* 29 C.F.R. §§ 2510.3-1(b)(3) (1984). Although this provision is specific and does not include severance pay benefits, we recognize that it was not meant to be exhaustive. *See id.* § 2510.3-1(a)(4). But, as we have concluded for other reasons that an unfunded severance pay policy is included within the definition of "welfare plan," we decline to read unfunded severance pay benefits into the catch-all provision of the regulation defining payroll practices. Perhaps severance pay is distinguished from other designated payroll practices because those set forth in the regulations occur during the course of employment, while severance pay occurs only after termination. *See Scott*, 754 F.2d at 1503. Moreover, an employer faced with the loss of many employees may owe a large amount in severance pay, increasing the risk that it might default on its severance pay obligations because of a lack of funds. This financial loss to employees is a primary concern of ERISA. *Id.*

III

Are Plaintiffs' Statutory and Common Law Claims Preempted Because They "Relate To" the Plan?

We turn to consider whether ERISA preempts plaintiffs' statutory and common law claims. The Act was aimed to occupy fully the field of employee benefit plans

and to establish it "as exclusively a federal concern." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). Section 514(a) of ERISA states that it "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan [within its coverage]." 29 U.S.C. § 1144(a) (emphasis added). Congress defined the term "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2). Although there has been uncertainty as to when a state law "relates to" a plan, the Supreme Court's opinion in *Shaw* v. *Delta Air Lines*, 463 U.S. 85 (1983), established that "relates to" must be construed in its "normal sense"—that is, a state law claim is preempted "if it has a connection with or reference to such a plan." *Id.* at 97 (footnote omitted). *Shaw* rejected the view that common law causes of action or state regulatory statutes are preempted only when they attempt to regulate an area expressly covered by ERISA, such as reporting, disclosure and fiduciary responsibility. *Id.* at 98.

Relying on *Rebaldo* v. *Cuomo*, 749 F.2d 133 (2d Cir. 1984), plaintiffs assert that the claims here do not "relate to" the plan. In that case, we held that a purely local transaction was at issue and the state law affected the plans in " 'too tenuous, remote or peripheral a manner to warrant a finding that the law "relates to" the plan.' " *Id.* at 138 (quoting *Shaw*, 463 U.S. at 100 n.21). The law at issue in *Rebaldo* indirectly increased the cost of doing business. We explained that when "a State statute of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some

economic impact on the plan does not require that the statute be invalidated." *Id.* at 139 (footnote omitted); *see also American Progressive Life & Health Insurance Co.* v. *Corcoran*, 715 F.2d 784, 787 (2d Cir. 1983) (commission scales adopted by state regulation might indirectly affect levels of benefits provided by insurer, but such was so peripheral to ERISA as not to be preempted by it). In this case, on the other hand, the state law claims seeking to enforce the severance pay policy would determine whether any benefits are paid, and directly affect the administration of benefits under the plan. As noted, the plaintiffs here were employed in 16 different states. The policy favoring national uniformity in this field, therefore, strongly supports preemption.

Plaintiffs, joined by amici, also urge that absent a clear expression from Congress, ERISA cannot be deemed to preempt state wage collection statutes because such legislation is a fundamental exercise of the states' police power. *See Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). They argue that wage collection statutes are no less important an exercise of traditional police powers than those state domestic relations laws found not to be preempted in *American Telephone & Telegraph Co.* v. *Merry*, 592 F.2d 118 (2d Cir. 1979). There, we held that ERISA does not preempt state domestic relations laws that affect distribution of pension benefits. *Id.* at 121. But in *Stone & Webster Engineering Corp.* v. *Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd sub nom. Arcudi* v. *Stone & Webster Engineering Corp.*, 103 S. Ct. 3564 (1983), we made clear that to avoid preemption it is not sufficient that the state statute represent the exercise of a traditional police power. 690 F.2d at 330. In order to avoid being preempted, a state law in addition to being an exercise of traditional police powers must also affect the plan

"in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21; *Authier* v. *Ginsberg*, 757 F.2d 796, 800 n.6 (6th Cir. 1985). Although the regulation of the employment relationship under New York Labor Law § 198-c is an exercise by the State of its traditional police powers, the state statute does not have such a remote and tenuous connection to Burlington's severance pay plan so as to allow us to conclude that it does not "relate to" it.

Amici finally urge that claims by employees to enforce the direct liability of employers for promised wages and benefits coexist with any rights plan beneficiaries may have to sue employee benefit plans under ERISA. They argue that the Supreme Court in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980), and circuit courts since *Nachman*, have distinguished between direct contractual liability that an employer has to its employees, and statutory liability under ERISA. The short answer to this argument is that *Nachman* and its progeny were based on federal rather than state law. As the plaintiffs are asserting state law claims, the district court properly found plaintiffs' claims preempted.

Other courts have found state law causes of action preempted when they were based on claims for relief under the common law of contracts, *see, e.g.*, *Lafferty* v. *Solar Turbines Int'l*, 666 F.2d 408, 409 (9th Cir. 1982); *Ogden* v. *Michigan Bell Telephone Co.*, 571 F. Supp. 520, 524 (E.D. Mich. 1983); *Tolson* v. *Retirement Committee of the Briggs & Stratton Retirement Plan*, 566 F. Supp. 1503, 1503-04 (E.D. Wisc. 1983); *Shaw* v. *Intn'l Ass'n of Machinists*, 563 F. Supp. 653, 658-59 (C. D. Cal. 1983); or state regulatory statutes, including § 198-c, *see, e.g.*, *Trustees of Sheet Metal Workers' Int'l Ass'n Production*

Workers' Welfare Fund v. *Aberdeen Blower and Sheet Metal Workers*, 559 F. Supp. 561, 562 (E.D.N.Y. 1983); *Calhoon* v. *Bonnabel*, 560 F. Supp. 101, 107-10 (S.D.N.Y. 1982); *California Hospital Ass'n* v. *Henning*, 569 F. Supp. 1544, 1547 (C.D. Cal. 1983). To hold otherwise would undermine the uniformity in plan administration that the Act was designed to promote.

IV

Should Burlington Be Estopped From Raising The Defense Of Preemption?

We turn finally to consider whether, even though a plan is established subject to ERISA's coverage section, Burlington should be estopped from raising the defense of preemption because it failed to comply with the Act's applicable reporting, disclosure and fiduciary requirements. ERISA is designed to provide employees with information about their rights under the plan so that they may police its administration. *See* H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649. Plaintiffs argue that since Burlington benefited from its failure to comply with these statutory requirements, it should be estopped from relying on the Act to avoid its contractual and state law obligations.

Burlington responds that it would be incongruous for an employer maintaining an informal plan to be able to circumvent the Act by failing to comply with its requirements. *See Donovan* v. *Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982). Courts that have accepted plaintiffs' argument have done so in the context in which an employer sought to avoid liability under ERISA. *See, e.g.*,

id. A different situation is presented here—the employer does not seek to avoid the strictures of ERISA by means of previous noncompliance, but rather raises preemption as a legal defense to state law obligations otherwise applicable to it. A serious risk of unfairness may exist when an employer that has never sought to comply with ERISA wants to use the Act's broad preemption provision to avoid potential liability to its employees under state law.

In *Blau*, 748 F.2d 1348, this dilemma was appropriately resolved. There it was held that the state law claims were preempted, even though the employer had totally failed to comply with ERISA. *Id.* at 1356. But rather than simply reviewing the employer's denial of severance pay to see if it was a reasonable construction of the terms of the policy, *see Slack* v. *Burlington Industries*, No. C-83-274-G (M.D.N.C. Oct. 17, 1984), *appeal docketed*, Nos. 84-2241(L), 84-2257 (4th Cir. Nov. 11, 1984), the court reviewed that denial in the context of the employer's failure to comply with ERISA's requirements. Recognizing that ordinarily there is no remedy for the violation for procedural requirements, the court held that in some circumstances noncompliance with procedural requirements will "work a substantive harm." *Blau*, 748 F.2d at 1354. It concluded that the employer had been arbitrary and capricious in adding a term to its severance pay policy. *Id.; see also McLaughlin* v. *Connecticut General Life Insurance Co.*, 565 F. Supp. 434, 447 n.9 (N.D. Cal. 1983) ("in order to enforce ERISA's fiduciary standards for claims denials, it may be appropriate . . . to apply [strict rules of construction] when the ERISA fiduciary making the denial [has] a financial interest in the decision").

We adopt that approach because it adequately protects the rights of employees with respect to the severance pay benefits, and best effectuates Congress's aim to promote the uniform administration of employee benefits. It both eliminates any incentive on the part of employers not to comply with the Act's reporting, disclosure and fiduciary requirements, and avoids inconsistent treatment of claims under state law. Thus, it is unnecessary and undesirable to hold Burlington estopped from raising the defense of preemption. The question of whether Burlington's violations of ERISA's requirements sufficiently taint its denial of severance pay so as to warrant a finding that it was arbitrary and capricious is not before us. That determination is left to the judgment of the district court. *Compare Blau*, 748 F.2d 1348 (violations sufficient under facts of case to warrant finding that denial was arbitrary) *with Jung*, 755 F.2d 708 (no violations sufficient under facts of case to warrant finding that denial was arbitrary).

V

Remaining Contentions

There is no merit to plaintiffs' remaining contentions. When Congress under ERISA has preempted the entire field of employee benefit plans, an argumnt for federal abstention founded upon substantial disruption to state policies extending beyond the present controversy is not properly made under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

Nor is there merit to the contention that the district court improperly enjoined the state administrative proceeding. Since there is a plan, Burlington is a fiduciary

with respect to that plan, *see Jung*, 755 F.2d at 710, and is authorized under the statute to seek an injunction of the state proceedings. *See* 29 U.S.C. § 1132(a)(3). Granting the injunction did not violate the Anti-Injunction Act, 28 U.S.C. § 2283, even assuming that the Anti-Injunction Act applies to administrative proceedings of the Industrial Board of Appeals, *see Town of Springfield* v. *McCarren*, 549 F. Supp. 1134, 1151 (D. Vt. 1982), *aff'd mem.*, 722 F.2d 728 (2d Cir. 1983), because the injunction falls within the Act's exception for actions "expressly authorized" by federal law.

CONCLUSION

Accordingly, the judgment appealed from is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IRVING GILBERT, et al.,

Plaintiff,

—and—

83 Civ. 6954
(CLB)

LILLIAN ROBERTS, as Commissioner of Labor of the State of New York,

Plaintiff-Intervenor,

—against—

BURLINGTON INDUSTRIES, INC.,

Defendant.

----------X

MEMORANDUM AND ORDER

Brieant, J.

In this action thirty-six former employees of the Sock and Hosiery Division of Burlington Industries, Inc. ("Burlington"), a major conglomerate, sue upon claims founded on the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and fraud claims as well as claims arising under statutes of New York and North Carolina said to be applicable, which relate to vacation and payroll severance benefits said to be due pursuant to a 1974 Burlington policy concerning severance pay.

In January 1982, Burlington sold to Kayser-Roth Hosiery, Inc. ("Kayser-Roth"), a large manufacturer, not a party to this litigation, all of its assets, trademarks, customer lists and goodwill used in and about its Sock and Hosiery Divisions. Under the sale agreement, Kayser-Roth agreed with Burlington "to use its best efforts to encourage all salaried and wage employees of the Operations, including all sales personnel to transfer to the employ of [Kayser-Roth]." (Plaintiff-Intervenor's Motion for Stay, filed March 12, 1984, Ex. H). The understanding between Burlington and Kayser-Roth that substantially all of the employees of the acquired Divisions would be retained is also set forth expressly in a supplemental agreement, dated December 18, 1981, which provides that, "[a]t the closing, [Kayser-Roth] will retain all employees, wage and salaried, of the Divisions . . .," except for five employees specifically referred to in the agreement. (Plaintiff-Intervenor's Motion for a Stay, Ex. G). Those five Burlington employees, not parties to this action, received severance benefits from Burlington.

After the sale, all of the plaintiffs, except one who retired, were employed by Kayser-Roth in the positions and at the salaries or rates of pay received previously from Burlington. However, plaintiffs here seek to enforce their rights to severance pay to the same effect as if Burlington had simply gone out of business with respect to its Sock and Hosiery Divisions, leaving them unemployed.

The Burlington policy regarding severance benefits, as set forth in the company Policy Manual as it existed at the time of sale of the Divisions to Kayser-Roth, provided in relevant part as follows:

> "Section: Compensation – Salaried Employees
> Sub-Sec: Terminations – Payroll Severance – Vacation Severance

I. *Company Policy*

A. *General* – The Company makes payroll severance payments and vacation severance payments to eligible salaried employees who are terminated from the Company.

B. *Payments* – Payroll severance payments are based upon tables contained in this policy. Vacation severance payments are based upon a person's length of continuous service with the Company less vacation taken or adjusted as defined by this policy.

II. *Application of Policy*

A. *Payroll Severance* – All regular full-time salaried employees who meet eligibility requirements are paid payroll severance based upon continuous service as shown in Exhibit A or Exhibit B.

1. *Eligibility* – Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the Company. Eligibility requirements are:

a. *Job Elimination* – This category consists of terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes.

b. *Other Involuntary Terminations* – These are terminations due to unsatisfactory job performance which is not willful.

2. *Ineligibility* – Employees are not eligible to receive payroll severance if:

a. *Temporary Full-Time, Temporary Part-Time, or Regular Part-Time Employees* – Employees assigned to these employment classifications are not eligible for payroll severance payments.

b. *Ineligible Full-Time Employees* – Employees who are terminated because of early retirement, mandatory retirement, death, misbehavior, lack of cooperation, willful negligence, or other unfriendly acts against the Company or towards its management are not eligible for payroll severance payments."

(Affidavit of Calvin A. Michaels, sworn to November 29, 1983, Exhibit A, at 1-2).

Defendant contends that this written policy applies only to employees who are involuntarily terminated *and* whose jobs are eliminated, leaving them unemployed, and that the use of the phrase "job elimination" evidences the intent to require the actual loss of a job as opposed to a mere termination from the Burlington payroll under circumstances which preserve the employee's job under new ownership and management of the same production assets. Plaintiffs argue that the plain, unambiguous language of the policy statement entitles them to severance pay.

Following the sale of the Divisions by Burlington, ten of the plaintiffs in this action filed claims with the New York State Department of Labor, pursuant to § 198-c of the New York Labor Law. Burlington applied to the New York State Commissioner of Labor ("the Commissioner") to dismiss these claims, asserting that § 198-c is preempted by ERISA, and therefore the New York State Labor Department lacks jurisdiction to adjudicate the claims. On September 2, 1983, the Commissioner

issued an Order to Comply with respect to plaintiff's claims. On September 8, 1983, Burlington appealed the Commissioner's decision to the Industrial Board of Appeals ("the Board"), again raising the preemption and jurisdictional issues, and was granted a stay of enforcement of the Order to Comply.

Prior to the issuance of the stay and on September 22, 1983, plaintiffs initiated this action alleging claims under ERISA and in the alternative under state law "because the case is governed either by state statutory and common law or by . . . ERISA, but most probably not by both." (Complaint at ¶ 1). After the Board was informed of commencement of this action, it adjourned all further proceeding, but now indicates an intention to resume its adjudicatory process.

On December 12, 1983, Burlington moved to dismiss the plaintiffs' claims in this case, or, in the alternative, to grant it summary judgment.

On January 5, 1984, the Commissioner was granted leave to intervene in this action, and on February 3, 1984, Burlington counterclaimed against the Commissioner, alleging that:

> "The New York State Department of Labor violated and continues to violate Section 114(a) (sic) of ERISA in (i) acting under Section 198-c of the New York Labor Law with respect to claims involving Burlington's severance benefit plan, (ii) assuming jurisdiction over such claims, (iii) issuing the Order to Comply, and (iv) failing to dismiss or discontinue all of the above described proceedings before it."

On March 16, 1984, the Commissioner moved to stay this federal action during the pendency of the state administrative proceedings. Thereafter, on April 13, 1984, Burlington requested that the Board adjourn its hearings since Burlington's motion was *sub judice*, and on April 20, 1984, the Board informed the parties that it intended to await this Court's determination of Burlington's motion before deciding whether to commence its own hearings.

In May, 1984, twenty-six additional claims for unpaid severance benefits were filed with the New York State Labor Department by former Burlington employees. All of these claimants are also plaintiffs in the instant action. Burlington responded as it had with respect to the earlier claims that they were preempted by ERISA.

Section 1144(a) of ERISA provides in pertinent part, that ERISA: "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan."

The central question raised by all of the pending motions is whether ERISA preempts plaintiffs' state statutory and common law claims.

As a threshold matter, this Court must determine whether Burlington's severance pay policy is an "employee benefit plan" within the coverage of ERISA. An "employee benefit plan" is defined as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3). The Burlington severance pay policy is clearly not an employee *pension* benefit plan, and therefore, it falls within the purview of ERISA only if it is an "employee welfare benefit plan." That term is defined to include:

> "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, death or unemployment or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other

> than pensions on retirement or death, and insurance to provide such pensions)."
> 29 U.S.C. § 1002(1).

Defendant contends that since § 1002(1) includes "programs" which provide "unemployment" benefits, and since severance pay is among the most common forms of unemployment benefits, it is clear that Congress intended to include severance pay plans as a form of employee benefit plan under ERISA. Burlington argues further that since the Act incorporates all of the types of benefits described in § 186(c) within the scope of the term "employee benefit plan," and since severance payments are specifically referred to in 29 U.S.C. § 186(c)(6), severance benefit plans are covered as employee benefit plans within the plain meaning of ERISA. Finally, defendant asserts that all federal courts heretofore addressing claims pursuant to severance pay plans have held that such benefits are covered by ERISA. *See, e.g. Dhayer v. Weirton Steel Division of National Steel Corp.*, 571 F.Supp. 316, 320-30 (N.D.W.Va. 1983); *Petrella v. NL Industries, Inc.*, 529 F.Supp. 1357 (D.N.J. 1982); *Dependahl v. Falstaff Brewing Co.*, 491 F.Supp. 1188, 1196 (E.D.Mo. 1980), *aff'd*, 653 F.2d 1208 (8th Cir.), *cert. denied sub nom. Dependahl v. Kalmanovitz*, 454 U.S. 1084 (1981); *Calhoun v. Falstaff Brewing Co.*, 478 F.Supp. 357, 359 (E.D. Mo. 1979); *Donnelly v. Aetna Life Insurance Co.*, 465 F.Supp. 696, 698 (E.D. Pa. 1979); *Pinto v. Zenith Radio Corp.*, 480 F.Supp. 361, 362-63 (N.D. Ill. 1979), *aff'd*, 618 F.2d 110 (7th Cir. 1980).

Plaintiffs argue that ERISA does not apply to Burlington's severance pay policy, and that therefore their state law claims need not be dismissed, because there is no *plan* as such, but simply a naked promise to pay severance benefits which is enforceable under state law. In support of their position, plaintiffs contend that every "employee welfare benefit plan" must have an identity and structure of its own, evidenced by a written instrument naming a fiduciary, providing for a funding policy, allocating responsibilities among those who will administer the plan, establishing procedures for the plan, identifying persons with

authority to amend the plan, and specifying the basis on which payments will be made to and from the plan. [Plaintiffs' Memorandum of Law, filed March 26, 1984, at 50, citing 29 U.S.C. §§ 1102(a) and (b)]. Plaintiffs also assert that a plan must either have identifiable asserts (sic) of its own, independent from the general assets of the employer, or commit itself to establishing a funding policy that will assure that an adequate proportion of the employer's income will be dedicated to the plan. Finally, plaintiffs contend that to qualify as a severance pay employee benefit plan within the meaning of the Act, the plan must have been established as a Taft-Hartley Trust pursuant to § 302(c) of the Labor Management Relations Act, 29 U.S.C. § 186(c). Plaintiffs assert that Burlington's severance pay policy fails to satisfy any of these basic criteria.

This Court concludes, however, that the Burlington severance pay policy is an "employee welfare benefit plan" for the purposes of ERISA, and within the plain meaning of that statute. The existence of a "plan" under ERISA is to be determined solely by an examination of the Act's "coverage" and "definitional" sections. *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982) (*en banc*); *Dependahl v. Falstaff Brewing Corp.*, *supra*. In construing the language used in a remedial Congressional enactment, in the absence of absurdity, legislative history to the contrary, or some other compelling reason, a Court should conclude that the words used by Congress were meant to have their plain, normal and commonly accepted meaning. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

It is clear that the plain language of § 1002(1) encompasses severance pay plans such as the one set forth in Burlington's policy manual: it is a plan, established by an employer, for the purpose of providing an unemployment benefit to its participants, the Burlington employees, through the use of general corporate assets. See 29 U.S.C. § 1002(1)(A), and/or a benefit described, i.e., enumerated, in § 186(c) of Title 29.

Employee welfare benefit plans need not be funded in order to be within ERISA. See 29 U.S.C. §§ 1081 and 1082.

Furthermore, plaintiffs misconstrue the import of the Act's fiduciary and reporting provisions: these provisions state the responsibilities of fiduciaries and administrators of plans covered by ERISA, but they do *not* set forth prerequisites for ERISA coverage. As the Court noted in *Donovan, supra*:

> "because the policy of ERISA is to safeguard the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan, ... it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans ... to circumvent the Act merely because an administrator ... failed to satisfy reporting or fiduciary standards." 688 F.2d at 1372.

Similarly, it would be incongruous to permit plaintiffs to undermine the express purpose of ERISA, the establishment of a uniform system under which employee benefits are defined and administered, by reason of defendant's alleged failure to comply fully with reporting requirements concerning a plan which met the Act's basic criteria.

Moreover, the Court rejects plaintiffs' contention that an employee welfare benefit plan must have been established as a Taft-Hartley trust. The language of the Act simply refers to the types of benefits "described" in § 186(c), but does not require that such benefit plans meet all the criteria of Taft-Hartley trusts. See S.Rep. No. 127, 93rd Cong., 2d Sess. 3 *reprinted in* 1974 U.S. Code Cong. & Adm. News 4851 (genesis of subsection 1002(1)(B) is "[a]n amendment offered by Senator Javits extending coverage ... to all benefit arrangements *described in or permitted by* Section 302 of the Taft-Hartley Act") (emphasis added).

Finally, the regulations promulgated pursuant to ERISA contradict plaintiffs' assertion that in order to come with the Act, a severance pay arrangement must be funded by assets separate from the employer's general funds and that severance benefits

to be paid from an employer's general assets are excluded from ERISA coverage. In an interpretive bulletin explaining fiduciary responsibilities under the Act, the Department of Labor stated in question and answer form:

> "Q: Must a welfare plan in which the benefits are paid out of the general assets of the employer have a procedure for establishing and carrying out a funding policy set forth in the plan instrument?
>
> A: No. Section 402(b)(1) requires that the plan provide for such a procedure 'consistent with the objectives of the plan' and requirements of Title I of the Act. In situations in which a plan is unfunded and Title I of the Act does not require the plan to be funded, there is no need to provide for such a procedure. If the welfare plan were funded, a procedure consistent with the objectives of the plan would have to be established." 29 C.F.R. § 2509.75-5.

Similarly, in a statement accompanying a proposed amendment to ERISA regulations, the Department of Labor stated that:

> "since the provision of severance pay is one of the recognized purposes for a welfare plan under section 3(1), it would seem that severance pay plans would in virtually all cases be welfare plans, whether or not they are also pension plans for the purposes of Title I of ERISA." 44 Fed. Reg. 11763 (1979).

Having determined that Burlington's severance pay policy is an "employee benefit plan" covered by ERISA, the Court will now address whether § 1144(a) preempts plaintiffs' state law claims.

Section 1144(a) of the Act states that ERISA supersedes any and all State laws "insofar as they *relate to* any employee benefit plan described in section 1003(a)" of the Act (emphasis added). This language has been construed broadly by the Supreme

Court to preempt state laws which "have a connection with or reference to" an employee benefit plan. *Shaw v. Delta Airlines, Inc.*, ____ U.S. ____, 103 S.Ct. 2890 (1983).

Both § 198-c of the New York Labor Law and § 75-1.1 of the General Statutes of North Carolina, upon which plaintiffs rely in seeking severance payments "relate to" the Burlington severance pay plan. It follows that Congress has, by ERISA, preempted these state laws.

Accordingly, defendant is entitled to a final injunction and stay of enforcement of the Order to Comply, and of the pending proceedings before the New York State Industrial Board of Appeals and the New York State Commissioner of Labor on the ground of federal preemption. The Commissioner's motion to stay this action is denied. Defendant is also entitled to a final judgment dismissing all state law, non-ERISA claims, pleaded in this action. *See, e.g., Dependahl v. Falstaff Brewing Corp.*, 491 F.Supp. 1188 (E.D.Mo. 1980), *aff'd*, 653 F.2d 1208 (8th Cir.), *cert. denied sub nom. Dependahl v. Kalmanovitz*, 454 U.S. 1084 (1981); *Ogden v. Michigan Bell Telephone Co.*, 571 F.Supp. 520, 523-24 (E.D. Mich. 1983); *Shaw v. Int'l Ass'n Machinists & Aerospace Workers Pension Plan*, 563 F.Supp. 653, 658-59 (C.D. Cal. 1983).

As a matter of discretion, the Court denies so much of defendants' motion which seeks dismissal or summary judgment with respect to the ERISA claims, with leave to renew when pretrial discovery is complete.

There is no just cause for delay. Rule 54(b), F.R.Civ.P. A judgment shall enter dismissing the state claims and granting injunctive relief as set forth above. Counsel for the remaining parties shall confer and agree upon a scheduling order with respect to the ERISA claims. A status report conference will be held before the Court on November 27, 1984 at 9:30 A.M., or at an earlier date if counsel for either party so requests.

Settle a Rule 54(b) Judgment on five (5) days notice.

So Ordered.

Dated: New York, New York
September 17, 1984

Charles L. Brieant
U.S.D.J.

Endorsement

IRVING GILBERT, et al., Plaintiff and LILLIAN ROBERTS, etc., Plaintiff-Intervenor v. BURLINGTON INDUSTRIES, INC., Defendant. 83 Civ. 6954-CLB

Reargument has been had, and on reargument this Court adheres to its prior decision. However, in the interests of Justice and to allay any misapprehension (unfounded) on the part of counsel, the Court amplifies its prior opinion to include the following:

> Nothing herein contained shall preclude the parties from submitting proof at trial as to whether or not Burlington's severance pay policy, on its face or as administered, requires unemployment of greater duration than "instantaneous" unemployment between engagements, as a condition for eligibility for benefits. However, it is the present conclusion of this Court that at the very least the severance pay policy, and indeed any such plan, contemplates unemployment for at least an instant of time at severance, and before the severed employee becomes re-employed by a new employer. Accordingly, during that instant of time, any severed employee is "unemployed" in contemplation of law. Such a severance plan may appropriately be regarded as a plan which as a matter of law and in the absence of evidence to the contrary, provides "unemployment benefits" within 29 U.S.C. § 1002(1)(A)."

A judgment has been signed.

So Ordered.

Dated: New York, New York
October 30, 1984

Charles L. Brieant
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IRVING GILBERT, et al.,

Plaintiffs,

—and—

83 Civ. 6954
(CLB)

LILLIAN ROBERTS, as Commissioner of Labor of the State of New York,

Plaintiff-Intervenor,

—against—

BURLINGTON INDUSTRIES, INC.,

Defendant.

----------X

JUDGMENT

The defendant, Burlington Industries, Inc. ("Burlington"), having moved on December 12, 1983 for summary judgment dismissing all of plaintiffs' claims; the plaintiff-intervenor, the Commissioner of Labor of the State of New York (the "Commissioner"), having moved on March 16, 1984 to stay this action during the pendency of state administrative proceedings on March 16, 1984; and Burlington having moved on July 11, 1984 for an Order permanently enjoining the Commissioner from enforcing Orders to Comply issued by the Commissioner pursuant to New York Labor Law Section 198-c on September 2, 1983 and June 22, 1984; and the aforesaid motions having come on to be heard on March 28,

1984 and July 20, 1984; and the Court having issued a Memorandum and Order on September 17, 1984, granting Burlington partial summary judgment, pursuant to Rule 54(b), with leave to renew as to the remainder of its motion, denying the Commissioner's motion for a stay, and granting Burlington's motion for a permanent injunction; and the Court having modified its memorandum and order by endorsement dated October 30, 1984 filed herein;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that (a) the claims stated in the "FIRST" through the "SEVENTH" causes of action of the plaintiffs' Amended Complaint, inclusive, are dismissed; (b) the Commissioner's complaint is dismissed; (c) the Commissioner, her agents, employees, and attorneys, and all divisions, bodies and organs of the New York State Department of Labor, are permanently enjoined from proceeding against Burlington with respect to the claims made by its former employees regarding the denial of severence benefits as reflected in Orders to Comply issued by the Commissioner on September 2, 1983 and June 22, 1984; (d) enforcement of said orders to comply is permanently stayed; and (e) the Court, expressly determining, under Rule 54(b), Fed. R. Civ. P., that there is no just reason for delay in entering final judgment dismissing the "FIRST" through the "SEVENTH" causes of action of the plaintiffs' Amended Complaint, and dismissing the Commissioner's Complaint in its entirety, hereby directs that final judgment dismissing the "FIRST" through the "SEVENTH" causes of action of the plaintiffs' Amended Complaint, and dismissing the Commissioner's Complaint in its entirety, be entered, and the same hereby is entered.

Dated: New York, New York
October 30, 1984

Charles L. Brieant
United States District Judge

United States Court of Appeals

for the

Second Circuit

Nos. 84-7824
84-7908

IRVING GILBERT, IRENE PRINCE, DAVID J. FRANK, HERBERT P. KAPLAN, BERNARD B. LARGMAN, DORA NICOLINI, HERBERT PEPPEL, BERTHA RICHIE, DAVID SCHOENECK, RAQUEL R. SILENSKY, MARIE SILVESTRI, BRENDA TILLMAN HUMPHREYS, B. GAITHER SHAW, JR., ROBERT S. AHRENS, BENJAMIN F. BLYE, JR., DAVID H. BRUNT, JACK R. CARPENTER, KENNETH E. ECKARD, RONALD F. GAUTHIER, LOUIS GORELICK, JEREMY HARRIS, RONALD H. HICKS, ROBERT D. HUDDLESTON, THOMAS R. JEROME, GASTON D. LOPEZ, MICHAEL LOSCHENKO, PHILLIP R. MULLINS, DOROTHY NOVAK, ANTHONY J. PETRONIS, BERNARD PORVIN, CHARLES A. POWERS, SAUL ROTH, JAMES A. SBARBORO, JOHN SELLS, JAMES M. STUTTS, and GORDON L. VAN DUSEN,

Plaintiffs-Appellants

LILLIAN ROBERTS,
as Commissioner of Labor of the State of New York,

Plaintiff-Intervenor-Appellant,

– against –

BURLINGTON INDUSTRIES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given pursuant to Rule 10 of the Rules of the Supreme Court of the United States that Lillian Roberts, Commissioner of Labor of the State of New York, as plaintiff-intervenor-appellant, hereby appeals to the Supreme Court of the United States under 28 U.S.C. § 1254(2) from the judgment of this Court entered on June 17, 1985.

Dated: New York, New York
August 30, 1985

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Attorney for Plaintiff-Intervenor-Appellant

By:

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United States Court of Appeals

for the

Second Circuit

Nos. 84-7824
84-7908
84-7914

IRVING GILBERT, IRENE PRINCE, DAVID J. FRANK, HERBERT P. KAPLAN, BERNARD B. LARGMAN, DORA NICOLINI, HERBERT PEPPEL, BERTHA RICHIE, DAVID SCHOENECK, RAQUEL R. SILENSKY, MARIE SILVESTRI, BRENDA TILLMAN HUMPHREYS, B. GAITHER SHAW, JR., ROBERT S. AHRENS, BENJAMIN F. BLYE, JR., DAVID H. BRUNT, JACK R. CARPENTER, KENNETH E. ECKARD, RONALD F. GAUTHIER, LOUIS GORELICK, JEREMY HARRIS, RONALD H. HICKS, ROBERT D. HUDDLESTON, THOMAS R. JEROME, GASTON D. LOPEZ, MICHAEL LOSCHENKO, PHILLIP R. MULLINS, DOROTHY NOVAK, ANTHONY J. PETRONIS, BERNARD PORVIN, CHARLES A. POWERS, SAUL ROTH, JAMES A. SBARBORO, JOHN SELLS, JAMES M. STUTTS, and GORDON L. VAN DUSEN,

Plaintiffs-Appellants

LILLIAN ROBERTS,
as Commissioner of Labor of the State of New York,

Plaintiff-Intervenor-Appellant,

— against —

BURLINGTON INDUSTRIES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given pursuant to Rule 10 of the Rules of the Supreme Court of the United States that Irving Gilbert and all the others named in the above-captioned action as plaintiffs-appellants, hereby appeal to the Supreme Court of the United States under 28 U.S.C. § 1254(2) from the judgment of this Court entered on June 17, 1985.

Dated: New York, New York
September 5, 1985

RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
Attorneys for Plaintiffs-Appellants

By: _____
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Of Counsel

Relevant Statutory Provisions

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, *et seq.*

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickeness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program –

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which –

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(10) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (sections 1331 to 1343 of Title 43).

* * *

(14) The term "party in interest" means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation.

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may

prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of Title 26 is permitted to make payments under section 1403 of this title shall be treated as a party in interest with respect to such trust.

* * *

(16) (A) The term "administrator" means—

(i) person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

§ 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any any employer engated in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

* * *

§ 1022. Plan Description and Summary Plan Description

(a) (1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024 (b) (1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a) (1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a) (1) (D) of this title.

(b) The plan description and summary plan description shall

contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies availabe under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

* * *

§ 1102. Establishment of Plan

Named Fiduciaries

(a) (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

Requisite Features of Plan

(b) Every employee benefit plan shall –

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter.

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c) (1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

* * *

§ 1132. Civil Enforcement

Persons Empowered to Bring Civil Action

(a) A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

Status of Employee Benefit Plan as Entity

(d) (1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

§ 1135. Regulations

Subject to subchapter II of this chapter and section 1029 of this title, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records (subject to section 1134(a) and (b) of this title).

* * *

§ 1144. Other laws

Supersedure; Effective Date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under secton 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

United States Department of Labor Regulation, 29 C.F.R. §2510.3-1(b)

(b) *Payroll practices.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include –

(1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as –

(i) Overtime pay,

(ii) Shift premiums,

(iii) Holiday premiums,

(iv) Weekend premiums;

(2) Payment of an employee's normal compensation, out of the employer's general assests, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); and

(3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, althcugh physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example –

(i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons.

(ii) Payment of compensation to an employee who is absent while on active military duty.

(iii) Payment of compensation while an employee is absent for the purpose of serving as a juror or testifying in official proceedings.

(iv) Payment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training (whether or not subsidized in whole or in part by Federal, State or local government funds), and

(v) Payment of compensation to an employee who is relieved of duties while on sabbatical leave or while pursuing further education.

New York Labor Law § 198-c

Benefits or Wage Supplements

1. In addition to any other penalty or punishment otherwise prescribed by law, any employer who is party to an agreement to pay or provide benefits or wage supplements to employees or to a third party or fund for the benefit of employees and who fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty days after such payments are required to be made, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in section one hundred ninety-eight-a of this article. Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor.

2. As used in this section, the term "benefits or wage supplements" includes, but is not limited to, reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay.